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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000928-MR

WILLIAM SCOTT KIMELTON — APPELLANT

v.

APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
INDICTMENT NO. 03-CR-00010

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: William Scott Kimelton was convicted of first-degree robbery in Wolfe Circuit Court and sentenced to twelve years' imprisonment. On appeal Kimelton contends that the circuit court committed three errors that warrant reversal of his conviction. First, Kimelton charges that there were various irregularities in the selection of the jury that were

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

serious enough to deprive him of his constitutional right to a fair and unbiased jury. Next, he alleges that three of the Commonwealth's witnesses gave inadmissible testimony that was sufficiently prejudicial to warrant a mistrial. Finally, he argues that the circuit court erred in failing to grant a directed verdict because the evidence was insufficient to support his conviction.

The robbery in question occurred on February 15, 2003. According to the Commonwealth, Kimelton, his former girlfriend Marsha Risner Hall, and an acquaintance, John Letcher Roe, went to Jody Akers' house and borrowed a rifle. That evening, the three drove in a pickup truck to the house of Eugene Brooks, an elderly man who lived alone. Kimelton went to the door wearing a bandana or some other kind of covering over his face. When Brooks answered the door, Kimelton forced his way inside, struck Brooks on the head with the rifle, and took Brooks' wallet containing several hundred dollars. The trio left and went to the home of an acquaintance, Tracy Little, who bought the rifle from them for $35.00.

The Commonwealth's main witness was Marsha Risner Hall. She had been charged with complicity in the robbery of Brooks, and had entered a guilty plea. On cross-examination, defense counsel suggested that she had an incentive to testify against Kimelton in return for a favorable plea agreement. Hall

admitted that the eight-year sentence she received following her plea of guilty to the robbery charge was being served concurrently with another sentence and would not therefore lead to any additional prison time for her.

Kimelton's version of the events that occurred on the day of the robbery was quite different. He claimed that he "broke up" with Hall on February 15th because she was angry that he had refused to purchase illegal pills for her. Early that afternoon, he, Hall and Roe drove in the pickup truck to a local food mart where Kimelton was dropped off. He then phoned an old friend of his mother's, Edna King, who drove over from Lexington to pick him up. He spent the night at her house in Lexington, and she drove him back to his mother's house on the evening of the next day.

The first issue on appeal concerns the composition of the jury and the grand jury. Kentucky Revised Statutes (KRS) 29A.080 provides the following exemptions:

> (2) A prospective juror is disqualified to serve on a jury if the juror:
>
> (a) Is under eighteen (18) years of age;
>
> (b) Is not a citizen of the United States;
>
> (c) Is not a resident of the county;
>
> (d) Has insufficient knowledge of the English language;

> (e) Has been previously convicted of a felony and has not been pardoned or received a restoration of civil rights by the Governor or other authorized person of the jurisdiction in which the person was convicted;
>
> (f) Is presently under indictment; or
>
> (g) Has served on a jury within the time limitations set out under KRS 29A.130.

In addition, KRS 29A.100(1) provides that

> upon the request of a prospective juror prior to assignment to a trial court, the Chief Circuit Judge, or after the juror's assignment to a trial court, the trial judge may excuse such juror upon a showing of undue hardship, extreme inconvenience, or public necessity. On the day on which the prospective jurors are summonsed to appear, any person not previously excused who desires to be excused shall be heard.

In reviewing the qualification forms of jurors who were excused from the panel from which his jury was drawn, Kimelton argues that the excuses provided, such as “no transportation,” “cannot afford to miss work,” “cannot allow employees to miss work,” “student,” and “no one to watch children” were not sufficient to meet the “undue hardship or extreme inconvenience” standard.

The Kentucky Supreme Court has noted that the criteria for excuse from or postponement of jury duty are broad, “requiring the exercise of substantial interpretation and

discretion [on the part of the trial court]."[2] While some of the excuses provided on the forms may appear insufficient to the appellant, there is no evidence that the trial court abused its discretion in excusing these jurors.[3]

Kimelton further claims, however, that the absence of these potential jurors meant that the jury did not represent a fair cross-section of the community. Specifically, he contends that women were underrepresented on the jury panel. He bases this contention on a Wolfe County census indicating that in 2000, there were 98.5 men per 100 women in Wolfe County. The jury panel in Kimelton's case was composed of 44 men and 42 women. Kimelton has failed to explain how this disparity in the jury panel is statistically significant. We note also that the jury that ultimately heard Kimelton's case was composed of three men and nine women.

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[2] Commonwealth v. Nelson, 841 S.W.2d 628, 631 (Ky. 1992).

[3] We have reviewed the 339 juror qualification forms in the record, and it appears that 216 individuals were exempted or excused from service by the court. Of this number, 42 were exempted for the reasons listed in KRS 29A.080 (20 because they were not residents of the county; 11 because they were convicted felons or had been indicted; another 11 because they had already served on a jury within the last 12 months), while 90 were excused for medical reasons.

Of the remaining 84, 28 were excused for work-related reasons; 13 because they were students; and 8 because they had to look after their children. The rest were excused for a variety of reasons, including several individuals who are the primary caregivers for elderly parents or disabled relatives, who have no means of transportation, or who have learning disabilities. In addition, several truckers whose work takes them away for several weeks at a time were excused.

Of the 123 jurors who were not exempted or excused, 12 had their service postponed until later in the year, and 10 were placed "on call."

A similar case in which an appellant challenged both the sufficiency of the excuses provided by potential jurors and the representation of women on the panel was recently analyzed by the Kentucky Supreme Court. In Bratcher v. Commonwealth,[4] several jurors were excused (as in Kimelton's case) because they claimed a financial hardship or because they had no one to look after their children. Bratcher alleged that this "inconsistent removal" of prospective jurors resulted in a systematic exclusion of mothers and persons from lower economic brackets from the jury. The Court concluded, however, that

> [w]hile it is unquestioned that "[t]here shall be no automatic exemptions from jury service,"[5] we find that the trial court granted no such automatic or per se exemptions. Instead, the trial court applied the hardship provision of KRS 29A.100, and did so correctly. That such application tends to allow the trial court to excuse mothers who have no alternative methods of childcare or people with lower-paying jobs is perhaps an inevitable result of a hardship exemption. This, however, does not constitute the sort of "systematic exclusion of a distinctive group"[6] that is prohibited in jury selection.[7]

Furthermore, "the central principle in any jury selection is the preservation of randomness all through voir

[4] 151 S.W.3d 332 (Ky. 2004).

[5] Ky. Rev. Stat. (KRS) 29A.090 ("[t]here shall be no automatic exemptions from jury service.")

[6] Commonwealth v. McFerron, 680 S.W.2d 924, 927 (Ky. 1984).

[7] Bratcher, supra, note 4, at 345.

dire and peremptory challenges. . . . Randomness means that, at no time in the jury selection process will anyone involved in the action be able to know in advance, or manipulate, the list of names who will eventually compose the empaneled jury."[8]

Kimelton is unable to show any deviation from randomness, any evidence that anyone could manipulate the list of names of those who would compose the jury, and finally, any evidence of the systematic exclusion of a definable group. The trial judge, well within his discretion, excused potential jurors for a wide variety of reasons. Nothing indicates that this rose to the level of a statutory or constitutional violation.

Kimelton's next argument concerns the court's use of "on call" jurors. From what we are able to glean from the record, these are jurors who have a valid reason to be excused from service, but are prepared to be "on call" and serve if the panel on hand is exhausted. The trial judge explained the rationale for this system as follows:

> My feeling is that some service is better than none at all. And all of them have asked to be excused from the panel, for the whole term, based upon extreme [in]convenience but they are willing to be of some service, and my thinking is that some service is better than no service, and we only call them, when we have exhausted

[8] Williams v. Commonwealth, 734 S.W.2d 810, 812 (Ky. App. 1987).

> the regular panel, and make a last ditch effort to try to get a jury.

Kimelton argues that these "on call" jurors are not required to show up for jury duty like the members of the regular panel, thus creating a "substantial deviation" in the jury selection process.[9] He further argues that it is difficult to distinguish why one juror was excused completely and another placed "on call." He characterizes this as "arbitrary and capricious" and notes that no provision for "on call" jurors can be found in Kentucky case law, rules, statutes or administrative regulations. He further argues that these criticisms extend to the grand jury pool as well, thereby casting doubt on the propriety of the indictment.

KRS 29A.100 provides for the temporary postponement of jury service.

> (2) The Chief Circuit Judge may designate and authorize one (1) or more judges of the court, the court's clerk, a deputy clerk, the court's administrator, or a deputy court administrator to excuse a juror from service for a period not to exceed ten (10) days or to postpone jury service for a period not to exceed twelve (12) months. The reasons for excuse or postponement shall be entered in the space provided on the juror qualification form.
>
> (3) In his or her discretion the judge may excuse a juror from service entirely, reduce

[9] In Commonwealth v. Nelson, supra, note 2 at 631, for example, the Supreme Court found that it was a "substantial deviation" from the statutes and regulations for a chief judge to delegate to a court administrator his authority to disqualify, postpone and excuse jurors.

> the number of days of service, or may postpone the juror's service temporarily for a period of time not to exceed, however, twenty-four (24) months. Whenever possible the judge shall favor temporary postponement of service or reduced service over permanent excuse. When excusing a juror, the judge shall record the juror's name, as provided in KRS 29A.080, and the reasons for granting the excuse.

Although Kimelton has failed to provide the specific number of "on call" jurors that were used in his case, we have reviewed the record and find that of the 339 jurors who were called for the months of January and February, only ten were placed "on call" and none of these ten were ever called to serve in any capacity on Kimelton's case. Although we agree that it could be a potentially serious deviation if an "on call" juror who had not been present for the entire voir dire was allowed to serve on the jury, that did not happen in this case and Kimelton therefore lacks standing to raise the question. He has also failed to explain how the absence of these ten individuals from the pool of over 300 potential jurors caused him any prejudice.

Kimelton's second argument concerns testimony by three witnesses for the Commonwealth. He contends that their statements were sufficiently prejudicial to violate his constitutional rights, and that the trial court erred in not granting him a mistrial.

The first statement was made by Jeff Crase of the Wolfe County Sheriff's Office, who investigated the robbery. He testified that,

> [after speaking to the victim, Eugene Brooks] I left just to generally look around the area. Instead of going back towards Breathitt County, I came on down towards Daysboro (sic), and I met up with some other officers at Hazel Green, and at that time we were attempting to serve a warrant on Scott Kimelton from Morgan County.

Defense counsel successfully objected to this testimony as inadmissible evidence of prior criminal activity,[10] and the jury was accordingly admonished to disregard the statement.

The next statements at issue came from Greg Motley, an investigative sergeant for the Kentucky State Police. Motley explained that in the course of investigating an earlier burglary, he and another officer were made aware that Marsha Risner Hall might have had a part in the Brooks robbery. He stated

> So, in the course of working on that [investigating the earlier burglary], I had spoken with Deputy Hollon (sic), and we – this boy [a witness] felt like that his sister, Marsha Risner, had had a part in this [Brooks'] burglary.

[10] See Ky. R. Evid. (KRE) 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.")

Defense counsel objected on the grounds that the testimony was hearsay. At the subsequent bench conference, he alleged that the Commonwealth was trying to "drag in" other crimes Marsha Risner Hall was involved in, and "tack them onto Scott Kimelton."

The court admonished the jury to disregard Motley's last statement. Motley then went on to testify that he had had "contact with Deputy Hollon, who had advised me that he had spoken with Marsha Hall, and she had given him a confession about a burglary – or a robbery that had occurred in Wolfe County." Defense counsel again objected, and the court again admonished the jury to disregard Motley's remarks.

The final remarks to which Kimelton objected were made by witness Kimberly Akers. According to the Commonwealth, Akers was simply meant to testify that Kimelton came to her home and told her about robbing Brooks. Akers' actual testimony was as follows:

> Commonwealth: "[D]id he [Kimelton] come to visit?"
>
> Akers: "No, he attacked me."
>
> Commonwealth: "He came and what?"
>
> Akers: "He came and attacked me at my home.
>
> Commonwealth: "Mr. Kimelton did?"
>
> Akers: "Yes, he did."

Defense counsel objected on the ground that he had not been previously informed about any attack. The court, after pointing out to defense counsel that Akers' remark was unsolicited by the Commonwealth, admonished the jury to disregard her statements.

The question on appeal is whether the admonitions by the court were sufficient to cure any prejudice stemming from the testimony of these three witnesses.

"A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error."[11]

> There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the admissible evidence would be devastating to the defendant, or (2) when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial."[12]

Kimelton has not succeeded in demonstrating an overwhelming probability that the jury was unable to follow the court's admonitions, or that the testimony of these witnesses was devastating to his case. The first comment by Jeff Crase regarding the warrant was prejudicial, but not fatal to Kimelton's case. Motley's comments about Marsha Risner Hall's

[11] Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003), citing Mills v. Commonwealth, 996 S.W.2d 473, 485 (Ky. 1999).

[12] Id. (citations omitted.)

involvement in another robbery were far more damaging to Hall's credibility as the Commonwealth's chief witness than to Kimelton.

Furthermore, defense counsel was given a full opportunity to impeach Hall, and he subjected her to a rigorous cross-examination in which he raised several inconsistencies in her testimony.

In regard to Kimberly Akers' testimony, it was clearly unanticipated by the Commonwealth. The Commonwealth's attorney stated:

> I didn't know that she was going to say that. That is not part of her statement that she gave to the police. What I anticipated her to testify is what he told her about the robbery.

Akers' testimony was prejudicial to Kimelton because it suggested that he is a violent person; on the other hand, Akers' further testimony that Kimelton had confessed to her that he had committed the robbery was far more damaging to his case. Specifically, she testified that Kimelton told her that he had "whipped" Brooks with a gun and left him for dead, and complained that Hall had "ratted" on him for what he had done. Again, defense counsel was given full opportunity to impeach the witness, and he was able to attack her credibility by eliciting the fact that she had called the police about Kimelton's alleged "attack" but that they had refused to respond.

Kimelton's final argument is that the evidence presented at trial was insufficient to support his conviction for robbery and that the court should therefore have granted his motion for a directed verdict. He contends that the identification evidence was unreliable. Brooks, the victim, was unable to identify his attacker. Susan Davis, a teenage neighbor who saw the assailant leaving Brooks' house, described him as tall and thin with long black hair, a description that does not fit Kimelton. The only positive identification of Kimelton was made by Hall, who is, as Kimelton reiterates, a convicted felon and drug user who had an incentive to testify against him.

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.[13]

It is the role of the jury to assess the credibility of the witnesses.[14] The jury in this case was made fully aware of Hall's possible biases, and the potential incentive that the

[13] Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991)(citations omitted).

[14] Hauser v. Public Service Co. of Indiana, 116 S.W.2d 657, 659 (Ky. 1937).

concurrent sentence represented, but chose nonetheless to believe her testimony.

> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.[15]

Under the evidence as a whole, including the testimony of Akers regarding Kimelton's confession, and the weakness of his alibi, it was not unreasonable for the jury to find guilt.

For the foregoing reasons, the judgment and sentence of Wolfe Circuit Court is affirmed.

ALL CONCUR.

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[15] Id.